

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

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In the Matter of

JUL 15 2004

Amendment of Section 73.202(b))		
Table of Allotments)	MB Docket No. 04-214	Federal Communications Commission
FM Broadcast Stations)	RM - 10992	Office of Secretary
(Jackson, Wyoming))		
)		

To: Office of the Secretary
 Attn: Assistant Chief, Audio Division
 Media Bureau

MOTION FOR EXTENSION OF TIME
TO FILE A COUNTERPROPOSAL

Millcreek Broadcasting, LLC ("Millcreek"), by its counsel and pursuant to Section 1.46 of the Commission's Rules, respectfully requests an extension of time in which to file a counterproposal in the above-captioned proceeding. As detailed below, a freeze on counterproposals involving FM Auction No. 37 allotments precludes Millcreek from filing its counterproposal in this proceeding. In support hereof, Millcreek states as follows:

1. On April 8, 2003, Bulldog Broadcasting ("Bulldog") petitioned the Commission to add Channel 249A at Jackson, Wyoming to the FM Table of Allotments. That petition is the subject of this proceeding. On June 10, 2004, the Commission released a *Notice of Proposed Rule Making (NPRM)*, which specifies that any counterproposal to the Bulldog proposal must be filed by August 2, 2004. See DA 04-1539. Millcreek desires to file, as a counterproposal in this proceeding, a proposal that it has developed. This counterproposal complies with all of the Commission's technical and legal rules. However, Millcreek is precluded from filing its counterproposal because of the freeze implemented by the Media Bureau on June 7, 2004, which

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prohibits the filing of any counterproposal involving a FM Auction No. 37 allotment. *See* DA 04-1642.

2. In the *Public Notice* announcing the FM Auction No. 37 freeze, the Media Bureau prohibited the filing of petitions and counterproposals that propose a change in channel, class, or reference coordinates of any of the 290 vacant non-reserved band FM allotments scheduled for Auction No. 37. The Media Bureau further specified that “any petition or counterproposal proposing a change to an Auction No. 37 allotment will be dismissed.” The counterproposal that Millcreek plans to file in this proceeding involves changes to one or more of the vacant FM allotments scheduled for Auction No. 37. Consequently, if Millcreek files its counterproposal in this proceeding, while the Auction No. 37 freeze is in effect, it will be dismissed. However, if Millcreek does not file its counterproposal by August 2, 2004 it could be precluded from ever filing it. *See* 47 C.F.R. § 1.420(d). Therefore, Millcreek respectfully requests an extension of time to file a counterproposal in this proceeding until the Media Bureau lifts the Auction No. 37 freeze.¹ The date that the Media Bureau intends to lift the freeze is unknown at this time. The *Public Notice* indicates that the date will be announced in a future public notice.

3. A refusal by the Commission to grant Millcreek an extension of time would violate the principles of *Ashbacker*.² Millcreek recognizes that *Ashbacker* does not prevent the Commission from adopting procedures that limit the ability of a party to file a counterproposal (cut-off procedures).³ However, *Ashbacker* does bar the Commission from adopting procedures

¹ As an alternative, if the Commission does not rule on this *Motion* by the August 2 deadline for filing counterproposals in this proceeding, Millcreek intends to file its counterproposal with a request for a waiver of the Auction No. 37 freeze.

² *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).


³ *See, e.g., Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd 4743 (1993) (“*Conflicts*”); *East Wenatchee, Washington, et. al.*, 11 FCC Rcd 17081 (1996).

that prohibit a party from filing a counterproposal, as is the case in this proceeding.⁴ Millcreek never had the opportunity to file its counterproposal because the Auction No. 37 freeze became effective on June 7, 2004, three days before the *NPRM* was released. It is also unlikely that the Media Bureau will lift the freeze before the August 2 deadline, thereby giving Millcreek the chance to file its counterproposal. Thus, this is not a case where Millcreek chose to wait until the last day to file its counterproposal. Further, as evidenced by the Appendix to the *NPRM*, it is the Commission's policy to accept counterproposals as comments in order to determine the proposal that best serves the public interest. If the Commission refuses to grant an extension of time for Millcreek to participate in this proceeding, the public could be deprived of a superior proposal.

WHEREFORE, for the reasons stated, Millcreek respectfully requests that the Commission grant its *Motion for Extension of Time*.

Respectfully submitted,

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July 15, 2004

Its Counsel

⁴ See *id.* In *Conflicts*, the Commission held that *Ashbacker* did not apply to "cut-off" procedures that require counterproposals to protect previously filed FM applications because the "cut-off" procedures also applies to the original proposal. This rule was upheld in *East Wenatchee, Washington*. However, here, the auction freeze was implemented after Bulldog filed its proposal but before Millcreek was permitted to file its counterproposal. In other words, Bulldog would have been permitted to change one or more of the Auction No. 37 channels when it filed its *Petition*, while Millcreek cannot. Therefore, the Commission has not treated similarly situated, bona fide proposals in a like manner, in violation of *Ashbacker*.

CERTIFICATE OF SERVICE

I, Lisa M. Holland, a Secretary in the law firm of Vinson & Elkins, do hereby certify that on this 15th day of July, 2004, I caused copies of the foregoing "**Motion for Extension of Time**" to be mailed, first class postage prepaid, or hand delivered, addressed to the following persons:

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